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November 4, 2021

SENT VIA EMAIL

Arkansas Racing Commission
Attn: Chairman Mark Lamberth
1515 West 7th Street, Ste. 505
Little Rock, AR 72201

Re: Issuance of License to Legends/CNB

Dear Chairman Lamberth:

I write today in hopes of resolving some mechanics of what the parties should expect when the mandate of the Arkansas Supreme Court issues. Gulfside's counsel may file a motion with the Supreme Court that could delay the mandate for a few days, but I am confident that the 5-2 majority opinion declaring that the ARC correctly ruled that Gulfside *was never a qualified casino license applicant* will not change. According to the Supreme Court Clerk's Office, the mandate is scheduled to issue on Monday, November 8, 2021. At that moment, the ARC Executive Director and Staff will have some mandatory actions to take. I am told by the AG's Office that there are some questions about what may be required of Mr. Campbell and his staff to do. Mr. Freeland, Mr. Campbell and I spoke today regarding what law governs the next steps, and this letter should capture those conversations.

When the mandate of the Supreme Court issues, Mr. Campbell will be required to take certain actions that very day. Based on the ARC Rules, the votes cast unanimously on June 18, 2020, and the clear and unappealable Order of the Arkansas Supreme Court, Mr. Campbell will be required to:

1. Send a letter to Gulfside returning their license application along with a refund check for \$250,000.00;
2. Present an award letter to Legends; and
3. Present Legends' License when I arrive to retrieve it.

I cannot emphasize in strong enough terms that CNB does not want any more litigation and is eager to renew our relationship with your agency and begin a long productive period of working together. So, I hope to answer what questions have been presented to me in the last couple of days. At this point, performance of the basic administrative actions described above will prevent any additional litigation initiated by my clients.

Mr. Bowen informed me that some members of the Commission have questions, such as:

- “Do we need to have a Commission vote before giving Legends their license?”
- “Can we wait to take action until the November or December ARC meeting?”
- “Should the ARC wait for any more litigation to resolve before acting?”

Respectfully, the answer to each question is “No.” To do otherwise is to ignore ARC Rules and the votes cast on June 18, 2020, and to defy the Order of the Supreme Court. A partial transcript of that June 18, 2020, meeting is attached to the end of this letter. Allow me to expand a bit on each question below.

“Should the Commission meet and vote before giving Legends their license?”

No. The Commission has already voted in public unanimously on this question. The partial transcript of the June 18, 2020, meeting, attached hereto, clearly shows unanimous agreement in favor of the instruction given by Chairman Lieblong stating that the “commission will issue the license to the highest scoring applicant, pursuant to Rule 2.13.9.” Since the Supreme Court removed Gulfside from the process completely, *Legends was and is the only qualified applicant with a score on June 18, 2020. Thus, Mr. Campbell has already been instructed to provide the license to Legends/CNB.*

“Can the ARC wait to take action until the November or December ARC meeting?”

No. The ARC set its own timeline for mandatory action in Casino Gaming Rule 2.12.10(a), which states that “***the Commission shall award and issue a casino license within 30 business days from the date the Commission announces that the application process has concluded.***” The Commission could have adopted a rule that reads “45 days” or “90 days” or “after the ARC meets and votes a second time,” but it did not do so. Rather, the ARC set a 30 day count down by rule and decided by vote (*see*, Partial Transcript below) to initiate the countdown. The time is now long elapsed, and the ARC has no discretion but to issue the casino gaming license to CNB/Legends upon issuance of the Arkansas Supreme Court mandate.

The fact that Gulfside is no longer a qualified applicant does not dismiss the ARC’s obligation to issue a license within the time limit it imposed on itself. ARC found that CNB/Legends was a qualified and worthy applicant within the original thirty (30) days. I submit the ARC has zero discretion in the matter and that the license must be issued to the applicant ARC determined was qualified to hold the license (*i.e.* Legends/CNB) immediately upon issuance of the mandate. *See, Clowers v. Lassiter*, 363 Ark. 241, 244, 213 S.W.3d 6, 9 (2005) (“mandamus is an appropriate remedy when a public officer is called upon to do a plain and specific duty, which is required by law, and which requires no exercise of discretion or official judgment.”).

“Should the ARC wait for any more litigation to resolve before acting?”

No. Mr. Campbell presented Gulfside an award letter and a license last year when clearly

Chairman Mark Lamberth

November 4, 2021

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critical litigation was pending. The same standard applies now. Mr. Campbell must present Legends with an award letter and a license following the issuance of Supreme Court's mandate, just as he did for Gulfside a year ago.

There are four remaining civil cases. Once we have the license in hand, we will immediately dismiss the two of those cases we filed and aggressively seek quick dismissal of the remaining two cases which were filed by others. However, no litigation at this point in any way provides a reason or justification to ignore the votes and rules cited above once the mandate issues.

In short, it is my sincere hope that the Executive Director will on the day of the mandate's issuance, follow the ARC's Rules and votes, and that he will heed the Supreme Court's Order. We, of course, offer to present ourselves at any subsequent meeting of the ARC to give an update on land purchase and construction. This long, difficult process is almost over. We regret that it has been stressful for all concerned and look forward to building a strong working relationship with this commission. We are committed to working very quickly to create jobs, generate tax revenue and fulfill the promises made by CNB to this Commission, the people of Pope County and to the State of Arkansas.

Thank you for your time and consideration.

Best Regards,



Dustin McDaniel
Partner

dmdaniel@mwbfirm.com

DBM/kaa

cc: Mr. Byron Freeland (*via email*)
Mr. John C. "Smokey" Campbell (*via email*)
Ms. Karen Whatley (*via email*)
Mr. Brian Bowen (*via email*)

**ARKANSAS RACING COMMISSION MEETING 6-18-2020
PARTIAL TRANSCRIPT**

[00:07:26] Butch Reeves: *According to the rule, we shall notify the party in writing each of the two applicants of the scores and their ranking. So, Mr. Chairman, I would ask you to read the letter that we prepared with the scores on it.*

[00:07:46] Alex Lieblong: All right. After an interview process, scoring of the applicants for the casino license in Pope County, Arkansas, these are the results of the scoring by the Arkansas Racing Commission. Cherokee Nation Business, five hundred and seventy two. Gulfside Casino Partnership, six hundred and thirty seven. *The commission will issue the license to the highest scoring applicant, pursuant to Rule 2.139-B and...*

[00:08:20] Butch Reeves: Thank you. Now we need a motion for the Commission to announce that the application process has concluded.

[00:08:27] Commissioner: Please let me make that... Mr. Chairman, motion to a...

[00:08:48] Alex Lieblong: Second? Thank you, Mr. Landers, we have a motion and a second. All in favor please say aye. Opposed? Ayes have it. Thank you.

[00:08:58] Butch Reeves: That letter will be issued to the parties today and there will be an approval letter and a denial letter being issued by the Commission today and then the denial letter, that party will have 15 days from that letter...So they have 15 days from when they get the letter. It should all go out today. But that concludes, far as I know, at least this meeting...

[00:09:36] Alex Lieblong: We have other business on...Does anybody have any other business? Do I have a motion that we adjourn? I have a motion.

[00:09:50] Michael Post: Second the motion.

[00:09:50] Alex Lieblong: I have a second from Mr. Post. All in favor please say aye. Arkansas Racing Commission is adjourned. Thank you.

MURPHY, THOMPSON, ARNOLD, SKINNER & CASTLEBERRY

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November 8, 2021

Mark Lamberth, Chairman
ARKANSAS RACING COMMISSION
1515 West 7th Street, Ste. 505
Little Rock, Arkansas 72201

Sent via email to mhlamberth@gmail.com

RE: Change in Information | Rule 2.13.15 of Casino Gaming Rules

Dear Chairman Lamberth:

As you know, I represent Gulfside Casino Partnership ("Gulfside"). On July 31, 2020, the Arkansas Racing Commission ("Commission") issued the casino gaming license for Pope County to Gulfside. Pursuant to Rule 2.13.15(c)iv of the Casino Gaming Rules ("Rules"), I write to notify the Commission of a "change that may affect the licensee's qualifications for licensure."

On October 21, 2021, the Arkansas Supreme Court issued its opinion in *Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership*, 2021 Ark. 183, in which it held that County Judge Jim Ed Gibson's letter of support in favor of Gulfside did not meet Amendment 100's letter-of-support requirement because Judge Gibson was not the county judge at the time Gulfside submitted its application. As a letter of support or resolution of support is required by Amendment 100 and by the Rules, the Arkansas Supreme Court's decision affects Gulfside's qualifications for licensure.

Rule 2.13.15(d) provides, "If the Commission determines that the change has the potential to disqualify a licensee, the Commission shall conduct a hearing for adjudication." Thus, I respectfully submit that a hearing for adjudication is necessary and required under the Rules at this juncture, and I would request the Commission set the hearing before taking any further action in connection with the Pope County casino gaming license.

Further, among the pending litigation, there are two cases in the Circuit Court of Pulaski County, Arkansas, appealing Findings of Fact and Conclusions of Law issued by the Commission dealing with the Pope County casino gaming license. In the first case, Legends Resort & Casino,

LLC (“Legends”), appealed the Commission’s decision to deny its application,¹ and in the second case, Gulfside challenged the Commission’s finding that Legends was a qualified applicant.² Both appeals were filed pursuant to the Administrative Procedure Act (“APA”). In Legends’ APA appeal, it asks the circuit court to reverse the denial of its application because, among other reasons, Gulfside’s letter of support did not meet Amendment 100’s letter-of-support requirement. Because Legends’ application is on judicial appeal, the Commission cannot take action on the application until Judge Griffen lifts his Order to Stay that is currently in place and remands the application to the Commission. Respectfully, Legends must exhaust its administrative appeal pursuant to the APA before the Commission takes further action regarding Legends’ application.

In Gulfside’s APA appeal, Gulfside alleges that Legends was not a qualified applicant because Legends did not demonstrate that it has casino gaming experience, as required by Amendment 100. If Gulfside prevails in its APA appeal, Legends is not eligible to receive the Pope County casino gaming license. The Commission has expended significant time and resources awarding the license to an applicant ultimately held by the courts to be ineligible. It seems sensible to allow the courts to decide whether Legends is eligible to receive a license before committing any additional efforts to this matter.

Finally, the argument that the Commission is required to issue a license to Legends was rejected by the circuit court in a previous case.³ In that case, Gulfside argued that the Commission was required to award Gulfside the license because Gulfside was the only qualified applicant in the May 2019 application period. Both the Attorney General and Cherokee Nation Businesses, LLC, (“CNB”) argued that this Commission has discretion as to whether to award a casino gaming license, regardless of whether there was only one applicant. The circuit court agreed with the Attorney General and CNB, consistent with the circuit court’s March 24, 2020, order, which held, “the Racing Commission is invested by Amendment 100 with both the privilege and responsibility of utilizing its discretion as to whether a casino license should be issued to any applicant, regardless of whether such applicant is the only applicant during an application submission period.” As such, Legends’ argument that the Commission is required to give it a license, as a matter of law, is incorrect and has been rejected by the circuit court.

¹ *Legends Resort & Casino, LLC v. Arkansas Racing Commission, Alex Lieblong, Mark Lamberth, Butch Rice, Denny East, Michael Post, Bo Hunter and Steve Landers, Commissioners, in their Official Capacities, and Gulfside Casino Partnership*, In the Circuit Court of Pulaski County, Arkansas, Case No. 60CV-21-1217

² *Gulfside Casino Partnership v. Arkansas Racing Commission and Legends Resort & Casino, LLC*, In the Circuit Court of Pulaski County, Arkansas, Case No. 60CV-21-1653

³ *Gulfside Casino Partnership v. Arkansas Racing Commission*, In the Circuit Court of Pulaski County, Arkansas, Case No. 60CV-19-5832. See Attorney General’s Response in Opposition to Motion for Contempt and Enforcement filed on May 29, 2020, and CNB’s Post-Judgment Motion to Intervene with Incorporated Brief of Law in Support, filed on June 25, 2020.

Your courtesy in considering these matters is greatly appreciated.

With best personal regards, I am

Sincerely,



Kenneth P. "Casey" Castleberry

KPC/wlw

cc: Commissioner Denny East (via email to denny@eastcotton.com)
Commissioner Michael Post (via email to mpost@mountbethel.com)
Commissioner Bo Hunter (via email to bohunter23@gmail.com)
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Arkansas Racing Commission
Attn: Chairman Mark Lamberth
1515 West 7th Street, Ste. 505
Little Rock, AR 72201

Re: Issuance of License to Legends/CNB

Dear Chairman Lamberth:

Mr. Castleberry's November 8, 2021, letter contains a number of misstatements and omissions that render his arguments null. Unfortunately, Mr. Castleberry omits key language from the rule cited in a last-ditch effort to keep a license the Arkansas Supreme Court has unequivocally stated Gulfside has never been qualified to hold. As discussed herein, Mr. Castleberry's position is meritless and, if followed, would result in this Commission being in violation of Amendment 100, the Arkansas Supreme Court's October 21, 2021, opinion, and its own rules.

Mr. Castleberry cites Casino Gaming Rule 2.13.15(d). First, Mr. Castleberry omits a key provision from the rule. When a licensee submits information indicating that it may no longer be qualified, the licensee **must also** "submit to the commission supporting documentation to prove the casino licensee **continues to be qualified.**" Mr. Castleberry has submitted nothing of the sort. He failed to do so because it is legally impossible at this juncture due to the opinion of the Arkansas Supreme Court. There is no documentation available to change that outcome.

Second, the rule pertains to a change that "has the potential to disqualify a licensee. . . ." The Arkansas Supreme Court opinion does not have "potential" to disqualify Gulfside Casino Partnership. It does disqualify Gulfside. It confirms and reinstates this Commission's initial order **rejecting** Gulfside. Gulfside was never entitled to hold a license at any time because it was never qualified as explained by the Arkansas Supreme Court opinion. That opinion confirmed this Commission's correct rejection of Gulfside's application. Thus, no hearing is needed because Gulfside has never had a valid interest in the casino gaming license. Moreover, Gulfside's requested hearing would be futile because it could never present documentation showing that it "continues to be qualified" when it was never qualified in the first place.

In regard to Legends' Pulaski County litigation, that litigation is based upon this Commission scoring Gulfside higher on June 18, 2020. Once the mandate issues from the Arkansas Supreme Court, that case will be moot, and Legends, upon receiving the license, will voluntarily nonsuit the litigation. The Circuit Court, per the Arkansas Rules of Civil Procedure, has no discretion to deny the voluntary

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nonsuit. Despite Mr. Castleberry's contention otherwise, a party is not required to continue futile, moot litigation. In fact, doing so is barred by various judicial doctrines.

Similarly, Gulfside's APA appeal regarding Legends' qualifications is now meritless. Gulfside, an unqualified and rejected entity, has no standing to challenge any entity's qualifications. Simply stated, Gulfside has no more standing than any other person or entity that is unqualified to hold the casino gaming license. For a party to be entitled to judicial review of an agency action, that party must meet these criteria: (1) the party considers himself or herself harmed; (2) the party has been **adversely affected by the agency action**; (3) the party has a **personal stake in the outcome of the controversy**; and (4) the party can demonstrate a **concrete, specific, real, and immediate injury** by the agency's final action. *Ark. Beverage Retailers Ass'n. Inc. v. Moore*, 369 Ark. 498, 505-06, 256 S.W.3d 488, 494 (emphasis added). Since Gulfside is not a qualified applicant, it does not have any personal stake in the outcome and is not adversely affected. To the substantive point of the litigation, this Commission has already found that Legends is a qualified applicant, a finding that remains in effect.

Lastly, Mr. Castleberry references vacated March 24, 2020, orders from the Circuit Court regarding its finding that the Commission is not required to issue a license. Those orders were vacated by the Arkansas Supreme Court on February 4, 2021. *Cherokee Nation Businesses, LLC v. Gulfside Casino Partnership*, 2021 Ark. 17. Vacated means they are a nullity and can have no legal effect. Moreover, Gulfside's argument was rejected by the Circuit Court because it had the temerity to ask the circuit court to compel the ARC to act when all Gulfside had done was submit an unqualified application. The applications had not been accepted, the application process had not been closed, the merit selection process had not been completed, and no scores had been issued by the ARC. Not only has all that been completed now, but also the Arkansas Supreme Court has ruled on Gulfside's lack of qualification.

Casino Gaming Rule 2.12.10(a) states that "the Commission shall award and issue a casino license within 30 business days from the date the Commission announces that the application process has concluded." On June 18, 2020, the ARC announced, after unanimous vote, the closure of the application process. At the same time, the ARC unanimously voted to award the application to the highest scoring, qualified applicant. That is Legends. Thus, the Commission simply has no discretion at this point. The application process is completed and Legends's status as the only qualified applicant is confirmed. Thus, once the mandate issues, this Commission is required by law to issue a license to Legends.

This matter is very simple: (1) Gulfside has never been a qualified applicant and has never had any valid interest in the casino gaming license; (2) Legends has met all required criteria to be awarded the license; and (3) the application process was closed by this Commission and staff was directed to award the application to the highest scoring, qualified applicant. Based upon these facts, this Commission retains no discretion at this point in the process to take any action other than for the Director to issue the license to Legends. Acting on Gulfside's letter will only spark more litigation and extend this application award process with no legal justification.

Legends is prepared to file a Petition for Mandamus with the Pulaski County Circuit Court immediately upon the issuance of the Arkansas Supreme Court mandate if this Commission refuses to issue it the license to which it is legally entitled. We would request that the ARC allow the process currently in place to ensue: Mr. Campbell has to provide Legends both the award letter and the license upon issuance of the Supreme Court mandate.

Chairman Mark Lamberth
November 8, 2021
Page 3 of 3

Thank you for your time and consideration.

Best Regards,

Dustin McDaniel

Partner

dmcdaniel@mwbfirm.com

DBM/kaa

cc: Mr. Byron Freeland (*via email*)
Mr. John C. "Smokey" Campbell (*via email*)
Ms. Karen Whatley (*via email*)
Mr. Brian Bowen (*via email*)
Mr. Casey Castleberry (*via email*)



STATE OF ARKANSAS
**Department of Finance
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November 9, 2021

Dear Mr. McDaniel:

I am in receipt of your letter dated November 4, 2021 regarding your request for immediate action by the Arkansas Racing Commission staff upon issuance of the Arkansas Supreme Court mandate. After consideration of your points and the Commission's commitment to a fair and transparent process for the public, The Commission will meet before the casino license is issued. If you or your client do not share in the position that transparency in this matter is vitally important, please proceed with any legal action you deem necessary. The Commission has set a meeting to address licensing matters for Friday, November 11, 2021, at 1:30 p.m. to be consistent with the mandate issued by the Arkansas Supreme Court in case number CV-21-289, as well as the Casino Gaming Rules. We have taken great strides to make this process as transparent as possible and commit to our duties as commissioners to follow the law, advice of counsel, and Casino Gaming Rules.

Mark Lamberth

Date